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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1987

RICHARD L. DUGGER, *et al.*,

Petitioner,

vs.

AUBREY DENNIS ADAMS, JR.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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Questions Presented:*

1. Does this court's holding in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that a capital sentencing jury may not be told that its decision is subject to further review, apply to the Florida advisory jury system where the trial judge makes the final sentencing decision?

2. Can Question 1 be considered on federal habeas when (1) the judgment became final before *Caldwell* was decided; (2) petitioner did not raise a *Caldwell* claim on direct appeal; and (3) the state courts have refused to consider the *Caldwell* claim on state collateral review on the ground that it was not raised on appeal?

This brief *amicus curiae* will address only Question 2.

* In this case, the parties have presented sharply different statements and counterstatements of the questions presented. Different as they are, both statements focus on whether there is split of authority in lower courts and whether the court below misapplied this Court's precedents. While these considerations are highly relevant to the decision to grant certiorari, they have little value in framing the discussion once certiorari is granted. We therefore submit this statement of the questions in the hope that the Court may find it helpful.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

Constitutions

Statutes

Treatises

Miscellaneous

87-121

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The present case involves the extended relitigation of the legality of a trial conducted many years ago in compliance with the then-existing standards. Such unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF ARGUMENT

In *Reed v. Ross*, 468 U.S. 1 (1984), this court held that a claim could be presented on federal habeas corpus despite the petitioner's default under state procedure if the claim invoked a subsequent decision of this Court which was both a clear break with the past and a case which applies retroactively. A *Reed* claim therefore necessarily implicates retroactivity analysis if the retroactivity on the new rule on habeas has not been previously resolved.

This Court, having accepted the Harlan-Powell view of retroactivity on direct review, should also accept that view on habeas corpus. Once that is done, the class of claims qualifying under *Reed v. Ross* shrinks to nearly zero. Claims sufficiently novel to avoid the procedural bar will nearly always be nonretroactive on habeas corpus.

ARGUMENT

A. Habeas corpus as an instrument of collateral attack is at best a distant relative of the historical "Great Writ."

Suggesting that habeas corpus be limited, as we will below, invariably produces a vehement reaction. "Any murmur of dissatisfaction with [collateral attack on convictions] provokes immediate incantation of the Great Writ, with the inevitable initial capitals, often accompanied by a

suggestion that the objector is the sort of person who would cheerfully desecrate the Ark of the Covenant." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142, 142 (1970). Before turning to the particular question at hand, then, it may be best to note a frequently overlooked aspect of the writ. Habeas corpus as we know it is vastly different in both purpose and function from the procedure on which Blackstone heaped his famous praise. See 3 W. Blackstone, *Commentaries* 129-138 (1768). The historical writ was used only for release from custody, *Wales v. Whitney*, 114 U.S. 564 (1885), and could not reverse a judgment of a competent court. Today's writ of collateral attack does not necessarily involve custody, *Carafas v. Lavelle*, 391 U.S. 234, 238 (1968), and nearly always involves a judgment of a court of unquestioned jurisdiction.

Habeas corpus developed through the centuries as various arms of government competed with each other for power. W. Duker, *A Constitutional History of Habeas Corpus* 12 (1980). First, the superior courts used it to establish superiority over local courts. *Id.* at 27-33. Then it became an instrument in the struggle between law and equity. *Id.* at 33-35. Finally, habeas corpus was a weapon in the struggle between crown and Parliament. *Id.* at 40-48.

The writ was usually issued to free a person summarily imprisoned by the executive, although summary judicial imprisonments were sometimes involved. *Bushell's Case*, 124 Eng.Rep. 1006 (1670). A conviction by a court of *limited* jurisdiction might be questioned as to jurisdiction, but the writ was denied if the prisoner was in custody for conviction of a crime by a court of competent jurisdiction. See 3 Blackstone, *supra*, at 132 (piracy conviction in ad-

miralty unquestionable). The Great Writ was simply unavailable for collateral attack on such a judgment.

The writ was brought to America and incorporated in our Constitution. U.S. Const. art. I § 9. The first Congress expressly granted the federal courts power to issue the writ. Judiciary Act § 14, 1 Stat. 81 (1789). The common law limitation remained, however. "An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous." *Ex Parte Watkins*, 28 U.S. (3 Pet.) 193, 203 (1830).

The limitation recognized in *Watkins* remained unchanged and was generally understood to be in force in 1867. In that year, Congress extended the federal writ to state prisoners detained in violation of federal law, but gave no indication that it intended to change the *Watkins* rule. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv.L.Rev. 441, 474-77 (1963).

The development of habeas corpus as a device to relitigate questions already decided by courts of competent jurisdiction was entirely a judicial invention. It began with the idea that the imposition of both fine and imprisonment, under a statute authorizing only one or the other, was beyond the "jurisdiction" of the court. *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 176 (1873). It was further expanded with the holding that a federal court has no jurisdiction to try an "infamous" crime without an indictment. *Ex parte Wilson*, 114 U.S. 417, 429 (1889). The outer limit of nineteenth century collateral attack was reached in *Ex parte Siebold*, 100 U.S. 371 (1879). On the theory that an unconstitutional statute is absolutely void, it was held that con-

stitutionality of the statute creating the offense could be reconsidered on habeas. *Id.* at 376-377. The rule was still in force, though, that errors of procedure could not be collaterally attacked, even if they rose to constitutional stature. *In re Belt* 159 U.S. 95 (1895) (validity of jury waiver statute); *Matter of Moran* 203 U.S. 96, 105 (1906) (allegedly forced self-incrimination not "jurisdictional").

Inquiry into procedural error was made available in the twentieth century to meet an overriding need. Black defendants were being wrongfully convicted due to infection of the system by racial prejudice, and direct review by this Court was insufficient to correct the injustices. See Friendly, *supra* p. 3, at 154-55; Bator, *supra* p. 4, at 523. In *Moore v. Dempsey*, 261 U.S. 86 (1923), the petitioners had been convicted in a mob-dominated trial and the state corrective process had made no serious inquiry into the due process issue. *Id.* at 87-90; cf. *Frank v. Magnum*, 237 U.S. 309, 333-336 (1915) (state court carefully considered question and decided trial was not mob-dominated). Finally, in *Brown v. Allen*, 344 U.S. 443 (1953), the court addressed the merits of Black petitioners' jury discrimination claims, with only one Justice contending that the state court's resolution of the issue be accepted as final. *Id.* at 545 (Jackson, J., concurring).

The point of this abbreviated history is that the use of habeas corpus as a device to relitigate questions which were or could have been raised in the original trial and appeal is entirely a creation of this Court. The decision in *Brown v. Allen* was not compelled by the common law, the Constitution, or Congress, but only by this Court's need to deal with an urgent sociolegal problem. As the problem fades, so does the need for this massive intrusion on the finality of state judgments. Bator, *supra* p. 4, at 523-24. Like the Con-

stitution itself, habeas corpus is not as an object of worship to be mummified and preserved unchanged, but rather a flexible doctrine which has been and can continue to be expanded *and contracted* to meet the needs of a changing nation. See Wright, *Habeas Corpus: Its History and Its Future* (Book Review), 81 Mich.L.Rev. 802, 810 (1983); Book Note, 95 Harv.L.Rev. 1186, 1188-89 (1982) (reviewing Duker, *supra* p. 3).

B. Only genuinely new rules are sufficiently novel to constitute "cause" under *Reed v. Ross*.

In *Wainwright v. Sykes*, 433 U.S. 72 (1977), this Court established the general rule that when a state procedural rule bars a claim due to failure to raise it at an earlier stage of the proceeding, a federal court may not consider that claim on habeas unless the petitioner shows cause for the default and resulting prejudice. A tactical decision of the attorney not to raise a claim is not cause. *Smith v. Murray*, ___ U.S. ___, 91 L.Ed.2d 434, 444, 106 S.Ct. 2661, 2666 (1986). Neither is an inadvertent omission on the part of the attorney, if it does not constitute ineffective assistance. *Murray v. Carrier*, ___ U.S. ___, 91 L.Ed.2d 397, 408, 106 S.Ct. 2639, 2645 (1986).

The issue of novelty of the argument as "cause" under *Sykes* is bracketed by the decisions in *Engle v. Isaac*, 456 U.S. 107 (1982) and *Reed v. Ross*, 468 U.S. 1 (1984). Both cases involved claims that jury instructions had unconstitutionally shifted the burden of proof of an element of the offense to the defendant. In *Engle*, the defendants claimed that lack of self-defense was an element of the crimes as defined by Ohio law and that once they showed evidence of self- defense the prosecution must prove its absence beyond a reasonable doubt. The trials had occurred

several years after *In re Winship*, 397 U.S. 358 (1970). In the years between *Winship* and the trials in question, many defendants had relied on *Winship* to challenge instructions placing the burden of proof of particular issues on them. *Engle, supra*, 456 U.S. at 131-33. If a defendant does not lack the tools to construct the constitutional claim, novelty of the argument will not constitute cause for failure to comply with the state procedural rule. *Id.* at 133.

In *Reed v. Ross, supra*, the jury in a murder case was instructed that use of a gun raises a presumption of malice shifting the burden of proof to the defendant. *Reed, supra*, at 6-7. The argument against this instruction would seem on its face considerably *less* novel than the argument advanced in *Engle*. Malice is traditionally an element of murder to be proved by the prosecution, while self-defense is traditionally an affirmative defense which many jurisdictions have required the defendant to prove. See W. La Fave and A. Scott, *Criminal Law* 45, n. 13, 48-49, n. 24, 528 (1972). The *Reed* court distinguished *Engle* by the fact that the trial in *Reed* had occurred before *Winship*. *Reed, supra*, at 19-20.

Novelty will constitute cause "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel." *Reed, supra*, 468 U.S. at 16. The most common instance of a claim without a pre-existing "reasonable basis" is where "this Court has articulated a constitutional principle that had not been previously recognized *but which is held to have retroactive application.*" *Id.* at 17 (italics added). *Reed* then equates "not previously recognized" with the "clear break with the past" test. *Ibid.* This "clear break" language is taken from *United States v. Johnson*, 457 U.S. 537 (1982), where the Court indicated that "clear break" cases are "decisions whose nonretroac-

tivity is effectively preordained." *Id.* at 553-54. The *Reed* court found that the pre-*Winship* authority was sufficiently sparse and that the practice of which Ross complained was sufficiently entrenched that the claim fell into one of *Johnson*'s three "clear break" categories. Therefore defense counsel had no reasonable basis to raise it at trial. *Reed, supra*, 468 U.S. at 18-19.

The threads of retroactivity are woven throughout the fabric of *Reed v. Ross*. They show clearly in all three opinions. Justice Harlan had noted the connection fifteen years earlier, when he pointed out that retroactivity on habeas was not an issue until *Fay v. Noia*, 372 U.S. 391 (1963). *Desist v. United States*, 394 U.S. 244, 261 (1969) (Harlan, J., dissenting). The *Reed* majority noted that retroactivity was a distinguishing characteristic of the primary category of cases to which its rule applied. *Reed, supra*, 468 U.S. at 17. The majority also lifted its "clear break" test directly out of retroactivity law. *Ibid.*

Justice Powell rested his deciding vote on the state's own procedural default in not raising the retroactivity issue. *Id.* at 20. The dissent noted the paradoxical result:

> Consequently, we have the anomalous situation of a jury verdict in a case tried properly by then-prevailing constitutional standards being set aside because of legal developments that occurred long after the North Carolina conviction became final.
>
> * * *
>
> Like the Court of Appeals, the Court proposes to adopt "novelty" as a possible form of "cause" under *Wainwright v. Sykes* to justify ignoring the

> State's procedural default rule. But this equating of novelty with cause pushes the Court into a conundrum which it refuses to recognize. The more "novel" a claimed constitutional right, the more unlikely a violation of that claimed right undercuts the fundamental fairness of the trial.

Id. at 21-22 (Rehnquist, J. dissenting).

The correction to the anomaly and the solution to the conundrum, we submit, is to always consider retroactivity with any *Reed* claim and to do so using the Harlan-Powell approach to retroactivity.

C. New decisions are generally not retroactive on collateral review.

The essence of a habeas petitioner's *Reed* claim is that the law has changed in an unexpected way and that he should not be "punished" for a lack of clairvoyance. But are the people of a state not entitled to make the same claim? The people's side of the unexpected change ledger is the issue of retroactivity.

It may be argued that the retroactivity of *Caldwell v. Mississippi* is not before the court, not having been considered below. There are several reasons why the court can and should consider it. First, this Court can consider issues raised for the first time by amicus when they are sufficiently important. *Mapp v. Ohio*, 367 U.S. 643, 646, n. 3 (1961); *Stovall v. Denno*, 388 U.S. 293, 294, n. 1 (1967) (retroactivity raised by amicus). Second is the inseparable connection between *Reed* and retroactivity mentioned above and developed further below. *Reed* was decided the way it was only because retroactivity was not raised. Had it been, the

"swing" vote would almost certainly have gone the other way. *Reed, supra*, 468 U.S. at 20 (Powell J., concurring). Consideration of *Reed* without considering retroactivity results in a distortion of the decision-making process. Third, consideration of the two issues together will result in a single rule for the novel claim situation, saving extensive litigation in the lower courts. Disregard of the issue, as in *Reed*, will leave the lower courts without guidance on the relationship between these two issues, one of which (*Reed*) will never occur without the other, absent a default by the state.

1. The rise of nonretroactivity: Linkletter-Stovall.

Under an earlier philosophy of jurisprudence, "retroactivity" was not an issue. Courts did not make law, it was thought, but only announced what had always been the law. 1 Blackstone, *supra*, at 69-70. Unconstitutional statutes were not "invalidated" by the decisions, they had never been true "statutes" at all. *Norton v. Shelby County*, 118 U.S. 425, 442 (1885).

Along with judicial activism and the quasi-legislative promulgation of detailed rules of criminal procedure came the realization that full retroactivity was not constitutionally required. A series of cases in the mid-1960's established a three-part test for retroactivity: (a) the purpose of the rule; (b) the extent of reliance on previous practice; and (c) the effect on the system of justice of full retroactivity. *Linkletter v. Walker*, 381 U.S. 618, 636 (1965); *Johnson v. New Jersey*, 384 U.S. 719, 727 (1966); *Stovall v. Denno*, 388 U.S. 293, 297 (1967). The central concern of this approach seems to be whether retroactivity is needed to reverse the convictions of innocent people. If a rule has a powerful connection with the reliability of the truth-finding process

and substantial numbers of innocent people have suffered false imprisonment, the reliance factor is swept away and the impact on the system must be borne as the cost of progress. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel established on collateral review); *Johnson, supra*, at 384 U.S. 727-28. Conversely, if the rule would exclude evidence in spite of its reliability to enforce a collateral policy, the social cost of full retroactivity may be prohibitive. *Linkletter, supra*, 381 U.S. at 637-38. (*Mapp* exclusionary rule not retroactive on collateral review). The close cases are those where the impact on truth is a matter of degree. *Johnson, supra*, 384 U.S. at 728-29. In this practical cost-benefit analysis the status of review as direct or collateral had little weight. *Stovall, supra*, 388 U.S. at 300-301.

2. *The Harlan approach.*

By the end of the decade, opposition had begun to form. In *Desist v. United States*, 394 U.S. 244 (1969), Justice Harlan took his stand that "'retroactivity' must be rethought." *Id.* at 258 (Harlan, J., dissenting). Instead of focusing on the purpose of the rule and weighing the costs and benefits of retroactivity, Justice Harlan focused instead on the nature of the judicial process.

> The first principle of jurisprudence is that courts decide cases according to the law. The most flagrant violation of this principle is the purely prospective "decision," one that is announced by the court but not applied to the parties before it. Because the power to announce constitutional rules flows solely from the duty to decide cases, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), such "pure" prospectivity is itself of doubtful constitutionality.

A more difficult question arises at the next step of the retroactivity ladder. Ernesto Miranda's conviction was reversed and his confession suppressed. *Miranda v. Arizona*, 384 U.S. 436, 491-92 (1966). Woodrow Whisman, whose similar case was on direct review at the same time, was denied the benefit of the *Miranda* rule. *Whisman v. Georgia*, 384 U.S. 895 (1966) (Douglas, J., dissenting); see *Johnson, supra*, 384 U.S. at 734. How could the Georgia court be correct and the Arizona court in error when they reached the same result under the same circumstances? It may well be socially efficient to so hold. The reversal of Miranda's conviction had nothing to do with the justice of his case, but it was a necessary cost of deterring police misconduct in the future. But is the difference in the treatment of Miranda and Whisman consistent with the Anglo-American system of law built on precedent? Justice Harlan thought not. *Desist, supra*, 394 U.S. at 258-59. If a legislature wishes to treat similarly situated people differently, it must at least have a rational basis for doing so. L. Tribe, *American Constitutional Law* § 16.2 (2d ed. 1988). How can this Court simply conduct a lottery?

The final step is the application of the Harlan theory to collateral review. If one accepts the analysis to this point, including the premise that the nature of the judicial process outweighs cost-benefit analysis, there are two principled answers. One could conclude that new rules must be applied on habeas as well, either on the Blackstone theory that law is discovered and not made, or on the theory that a habeas petition is not significantly distinguished from a direct appeal to apply a different rule. On the other hand, one could conclude both that a habeas petition is fundamentally different from an appeal, *Mackey v. United States*, 401 U.S. 667, 682 (1971) (Harlan, J. concurring and

dissenting), and that the announcement of a truly new rule is an actual change in the law and not just a discovery.[1]

If the law has genuinely changed, we must return to the fundamental ground for habeas corpus relief: that the prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Which laws? Those existing at the time of his trial and conviction or those existing at the time of his habeas petition?

To answer the question, we must return to the purpose of the writ. Why do we allows relitigation of convictions already final and already reviewed by one hierarchy of reviewing courts? Is the purpose to correct injustice? If so there would be no reason to limit the review to constitutional questions. We would instead limit the writ to prisoners who are actually innocent. See generally Friendly, *supra* p. 3.

Is the purpose of habeas corpus to give those convicts not granted certiorari by this Court the same scope of review as those who are? If that were the purpose then retroactivity on habeas would be the same as on direct review, a course this Court has not followed, as we will describe below.

Professor Hart has suggested that a prisoner ought to have a federal court hearing on his federal claim. Hart,

1 Whether a rule is truly new is a difficult question in some contexts, but not in the present case, as we will develop in part D, below.

Foreword, 73 Harv.L.Rev. 84, 106-07 (1959). Even if we assume this to be true, though, it does not tell us *why* a federal forum is necessary, and it does not explain why we have collateral attack on federal convictions. 28 U.S.C. § 2255. The most convincing reason for *Brown v. Allen* was advanced by Judge Friendly. "[W]ith the growth of the country and the attendant increase in the Court's business, it could no longer perform its historic function of correcting constitutional error in criminal cases by review of judgments of state courts and had to summon the inferior federal judges to its aid." Friendly, *supra* p. 3, at 155 (footnote omitted); see also Bator, *supra* p. 4, at 521, n. 211.

This Court's workload is such that it must concentrate its limited time on resolving the unresolved issues of American law. Cases must be selected based on the breadth of the issues presented, the number of people they affect, and the extent of disagreement in the lower courts. There may not be time to grant review in a case affecting few people, even where the court below has clearly violated stare decisis and failed to obey a precedent established by this Court.

Calling out the lower federal judges as a posse comitatus to help this Court with its police function does not necessarily imply that the scope of review on habeas must equal this Court's scope on certiorari or appeal, however. On direct review the question is "Did the court below err?" On habeas corpus the question is "Did the petitioner's trial violate the Constitution or laws of the United States?" There is no inconsistency in answering different questions differently.

All that is necessary to carry out the purpose of habeas corpus is to determine whether the state courts did their

duty to uphold the Constitution as the supreme law of the land. U.S. Const. art. VI § 2. Within the confines of stare decisis, that means obedience to the precedents established by this Court as of the time of the state court decision. Failure to anticipate a future "clear break" is not a violation.

3. From Hankerson to Griffith.

Justice Harlan never convinced a majority of the Court of the soundness of his approach. With his passing in 1971, the approach lost its voice for a few years. In 1977, Justice Powell picked up the torch. In a brief concurrence in *Hankerson v. North Carolina*, 432 U.S. 233, 246-48, he simply stated that it was time the Court adopted the Harlan approach.

In the following years, the Harlan-Powell theory came to control retroactivity *de facto*, whether or not it was acknowledged in the lead opinion. Every significant retroactivity case was decided in favor of retroactivity for direct review and against it on collateral review. *Hankerson v. North Carolina*, 432 U.S. 233 (1977) (*Mullaney v. Wilbur*, 421 U.S. 684 (1975) retroactive on direct); *Brown v. Louisiana*, 447 U.S. 323 (1980) (*Burch v. Louisiana*, 441 U.S. 130 (1979) retroactive on direct); *United States v. Johnson*, 457 U.S. 537 (1982) (*Payton v. New York*, 445 U.S. 573 (1980) retroactive on direct); *Solem v. Stumes*, 465 U.S. 638 (1984) (*Edwards v. Arizona*, 451 U.S. 477 (1981) not retroactive on collateral); *Shea v. Louisiana*, 470 U.S. 51 (1985) (*Edwards* retroactive on direct); *Allen v. Hardy* ___ U.S. ___, 92 L.Ed.2d 199, 106 S.Ct. 2878 (1986) (*Batson v. Kentucky*, ___ U.S. ___ 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986) not retroactive on collateral); *Griffith v. Kentucky*, 93 L.Ed.2d 649, 107 S.Ct. 708 (1987) (*Batson* retroactive on direct).

The movement toward acceptance of the Harlan-Powell approach in theory as well as in fact began in *United States v. Johnson, supra*. The *Johnson* court decided that all Fourth Amendment decisions not clearly controlled by prior precedents would apply retroactively on direct review. *Id.*, 457 U.S. at 562. Fourth Amendment cases seemed to be a curious place to make this stand. Of all constitutional claims, the exclusionary rule has the least relation to the justice of the case. It came as no surprise, then, that the Court later decided "There is nothing about a Fourth Amendment rule that suggests that in this context it should be given greater retroactive effect than a Fifth Amendment rule." *Shea, supra*, 470 U.S. at 59.

The giant leap came last term in *Griffith*. The Harlan-Powell approach was accepted for all cases on direct review, including those which were a "clear break" from the past. The nature of the process of adjudication and the need to treat similarly situated defendants the same were held to override the considerations of the three-prong test of *Linkletter-Stovall*. *Griffith, supra*, 93 L.Ed.2d at 660-61, 107 S.Ct. at 715-16.

The burning question after *Griffith* is whether there remains any principled reason for not accepting the remainder of the Harlan-Powell approach. See *id.*, 93 L.Ed.2d at 662-63, 107 S.Ct. at 717 (Rehnquist, C. J., dissenting). We submit that there is not.

It may be argued that direct and collateral challenges are not distinguishable for retroactivity purposes. *Id.*, 93 L.Ed.2d at 664, 107 S.Ct. at 718 (White, J., dissenting). Whatever strength that argument had, it was rejected in *Griffith*. There now exists a bright, clear line between direct and collateral review.

The dissent also argued that it was a fortuity that the new rule was established on direct review and not collateral. *Id.* 93 L.Ed.2d at 664-65, 107 S.Ct. at 718. Yet history shows that virtually none of the landmark criminal procedure decisions have been made on federal habeas for state prisoners. Most have been made on direct appeal and a few have been made on appeal from state collateral review. See Friendly, *supra* p. 3, at 165, n. 123. This Court can control its own docket to fish primarily from the stream of direct appeal.

Acceptance of the Harlan-Powell approach does not mean that no new rule will ever be retroactive on collateral review. A decision that a state cannot proscribe the defendant's conduct at all would apply. *Mackey, supra*, 401 U.S. at 692. So would a rule going to the very essence of a fair hearing, such as *Gideon*. *Id.* at 693-94. With over a hundred volumes of cases decided since the criminal procedure revolution began it is doubtful whether any undiscovered rules of *Gideon* magnitude remain, but the theory allows for the possibility.

In short, when *Griffith* established the Harlan-Powell approach on direct review, it did away with the objections to the acceptance of that approach on collateral review. Instead of using one theory for direct review and another theory with fundamentally different premises for collateral review, the Court should adopt the Harlan-Powell approach as the single controlling rule for all retroactivity issues.

D. Any claim sufficiently novel to constitute cause under *Reed v. Ross* is necessarily not retroactive.

The final question, and the one dispositive of this case, is whether a claim that qualifies as "novel" under *Reed v. Ross* can ever qualify for retroactive application on habeas corpus. For a claim to qualify as novel, it must not be a simple application of prior precedent to new facts, but an actual "clear break with the past." *Reed, supra,* 468 U.S. at 17. The break must be so clear, in fact, that competent counsel would have lacked the tools to construct the claim. *Engle, supra*, 456 U.S. at 133.

We submit that the class of claims novel enough to qualify as cause for default under *Reed* is a subset of those new enough to be denied retroactive effect on habeas. That is, the novelty analysis that establishes the qualification under *Reed* is more than enough to establish that the procedure in question was not in violation of the Constitution or laws of the United States as they stood at the time of the trial. The Court below, applying *Reed* and *Engle*, found respondent's claim under *Caldwell v. Mississippi,* 472 U.S. 320 (1985) to be so novel at the time of the trial that it was not reasonably available to him. *Adams v. Dugger*, 816 F.2d 1493, 1497-1500 (11th Cir. 1987). Assuming that conclusion to be correct, *Caldwell* is necessarily not retroactive to respondent's case unless it falls within one of the very narrow exceptions to the general rule of nonretroactivity.

Unquestionably, *Caldwell* does not affect the substantive power of the state to prohibit murder or even to exact death as a punishment for murder. See *Mackey, supra*, 401 U.S. at 692. It would also seem to be beyond question that a *Caldwell* claim is not a claim for nonobservance of those

procedures implicit in the concept of ordered liberty. See *id.* at 693.

Respondent's express claim that he qualifies under *Reed v. Ross* and his implicit claim that *Caldwell* applies retroactively are therefore inherently contradictory. One bar or the other must necessarily apply.

E. There has been no fundamental miscarriage of justice.

This Court has previously noted that there may be a "fundamental miscarriage of justice" exception to *Sykes*. *Engle, supra*, 456 U.S. at 135. For guilt phase error, this means actual innocence. *Murray v. Carrier*, ___ U.S. ___, 91 L.Ed.2d 397, 413, 106 S.Ct. 2639, 2650 (1986). This concept does not easily translate to the penalty phase. In one case, the test applied was whether the error "serve[d] to pervert the jury's deliberations." *Smith v. Murray*, ___ U.S. ___, 91 L.Ed.2d 434, 447, 106 S.Ct. 2661, 2668. The highly speculative possibility that the instructions in this case were detrimental to the defendant can hardly be characterized as perverting the jury's deliberations.

By his own admission, respondent molested and murdered a helpless eight year old little girl. *Adams v. State*, 412 So.2d 850, 851 (Fla. 1982). Whatever "fundamental miscarriage of justice" may mean in the penalty phase, it surely cannot apply to such a case. The miscarriage of justice in this case has been the delay of justice, and hence its denial, for nearly six years after the decision of the Supreme Court of Florida, *id.*, and over five years after denial of certiorari in this Court. *Adams v. Florida*, 459 U.S. 882 (1982).

Conclusion

The decision of the Eleventh Circuit should be reversed and the petition for writ of habeas corpus denied.

Dated: April, 1988

Respectfully submitted,

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